02-1538

(2)

No.

IN THE
SUPREME COURT OF THE UNITED STATES

KHANG MARTIN,

Petitioner,

V.

BMW MANUFACTURING CORP.,

Respondent.

SUPPLEMENTAL APPENDIX

Respectfully submitted,

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12 pp

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

KHANG MARTIN, Case No.: No. 6:01-0259-25AK

Plaintiff,

vs.

BMW MANUFACTURING CORP.,

Defendant

This matter is before the court on the defendant's motion for summary judgment pursuant to Fed.R.Civ.P.56. In his complaint, the pro se plaintiff alleges racial discrimination and retaliation pursuant to Title VII.

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(A), and Local Rule 73.02(B)(2)(g), D.S.C., all pretrial matters in employment discrimination cases are referred to a United States Magistrate Judge for consideration.

FACTS PRESENTED

The plaintiff, Khang Martin, an African-American, began working for the defendant BMW Manufacturing Corporation ("BMW") beginning in 1995 through a staffing agency. In December 1996, the plaintiff became a regular full-time employee of BMW as a team assistant in the control room. He was promoted to the position of production control room

staff in the Paint Department in February 1998. He worked the B-shift.

On August 19, 1999, the plaintiff was disciplined for violating BMW's anti-harassment policy. The plaintiff had asked a female coworker inappropriate questions, including whether she knew any "bi-curious" females. In his deposition, the plaintiff admitted he behaved inappropriately (Compl. 8).

In May 1999, an employee in the Paint Department was transferred to another department. The plaintiff expressed "verbal interest" in the position (Compl. 7). The vacant position was downgraded from a coordinator level to a staff position (Martin dep. 112-114). A white employee was given the position and the plaintiff alleges he was told it was because the other employee was the "best fit" (Martin dep. 122). He was also told the new position was not dealing with [his] technical knowledge" (Martin dep. 120). In September 1999, the Paint Department was reorganized. The plaintiff remained on the B shift and asked to be transferred to the A shift. His request was denied. He testified that he was merely speculating that he was denied the position in May 199 and a transfer to the A shift because of his race (Martin dep. 133-134).

In December1999 and January 2000, the regular computer system access of a supervisor and coworker were removed. After an investigation, the Pint Department management concluded the plaintiff was responsible and gave him a third level written warning in late January 2000. A third

level reprimand is the severest form of reprimand at BMW short of termination.

In March 2000, BMW conducted its annual performance evaluations and it was decided that the plaintiff should be terminated on the grounds of his prior misconduct and his lack of improvement in his job performance. The plaintiff was paid for his unused vacation days on May 5th and his unused earned time off on May 19th. Pl. ex. 5.

The plaintiff filed his complaint with the Equal Employment Opportunity Commission ("EEOC") on April 17, 2000, alleging retaliation. He filed this action on January 29, 2001. BMW filed this motion for summary judgment on December 28, 2001. By order of this court filed January 2, 2002, pursuant to *Roseboro v. Garrision*, 528 F. 2d 309 (4th Cir. 1975), the plaintiff was advised of the summary judgment dismissal procedure and the possible consequences if he failed to adequately respond to the motion. The plaintiff filed his response on February 4, 2002.

APPLICABLE LAW

Rule 56© of the Federal Rules of Civil Procedure states, as to a party who has moved for summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

> that the moving party is entitled to judgment as a matter of law.

Accordingly, to prevail on a motion for summary judgment, the movant must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) that she is entitled to judgment as a matter of law. As to the first of these determinations, a fact is deemed "material" if proof of its existence or nonexistence would be affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in her pleadings; rather, he must demonstrate the specific, material facts exist which give rise to a genuine issue. *Id.* at 324. Under this standard, the existence of a mere scintilla of evidence in support of the plaintiff's position is insufficient to withstand the summary judgment motion. Anderson, 477 U.S. at 252.

Likewise, conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. Toss v. communications Satellite Corp., 759 F.2d 355,365 (4th Cir. 1985). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. Accordingly, when Rule 56(e) has shifted the burden of proof to the non-movant, he must produce existence of every element essential to his action that he bears the burden of adducing at a trial on the merits.

ANALYSIS

Discrimination Claim

The plaintiff alleges various actions on behalf of BMW were discriminatory. He alleges he was: denied a transfer to the A shift, a promotion to another position, and training; "double-managed;" and eventually terminated because of his race.[1] Initially, the court notes some of the plaintiff's claims are procedurally barred. The plaintiff filed his first charge with EEOC on April 17, 2000, alleging he was denied a promotion and terminated based upon discrimination. Thus, the court must

[1]In his memorandum in response to this motion, the plaintiff contends he was subjected to being continuously "double managed" when a B shift manager was absent and an A shift manager supervised him. It is unclear exactly what adverse action the plaintiff is complaining about. In any event, as discussed herein, this claim is procedurally barred.

first limit the plaintiff's claims to actions occurring after June 12, 1999, or 300 days before he filed the first EEOC charge. *Beall v. Abbott Laboratories*, 130 F.3d 614, 620-21 (4th Cir. 1997). Accordingly, the plaintiff's allegation regarding the denial of a promotion in May 1999 is procedurally barred. Further, the claim regarding the denial of training and being "double-managed" were not raised in the plaintiff's charge to the EEOC and thus are procedurally barred. See *Dennis v. County of Fairfax*, 55 F.3d 151, 156(4th Cir. 1995)("Where...claims raised under Title VII exceed the scope of the EEOC charge and any charges that would naturally have arisen from an investigation thereof, they are procedurally barred.").

As to the plaintiff's allegations regarding his termination, since he has put forth no direct evidence of discrimination, his *prima facie* case is assessed under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). To establish a prima facie case of discrimination under McDonnell Douglas, the plaintiff must show (1) he is a member of a protected class; (2) he was qualified for his job and was performing it to his employer's legitimate expectations; (3) in spite of his qualifications and performance, he was fired; and (4) the position remained open to similarly situated qualified applicants after his dismissal. On the prima facie case is established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse

employment action. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *Brinkley v. Harbour Recreation Club*, 180 F.3d 598 (4th Cir. 1999). If the employer meets its burden of production, the presumption of discrimination raised by the *prima facie* case is rebutted and "drops from the case," and the plaintiff bears the ultimate burden of proving that he has been the victim of discrimination. See *St. Mary's hon or Center v. Hicks*, 509 U.S. at 507 (1993).

Assuming the plaintiff can establish a prima facie case, BMW has offered the plaintiff's unsatisfactory job performance and his prior misconduct as its legitimate, non-discriminatory reason for its termination of the plaintiff. The plaintiff contends BMW wrongly found him responsible for the computer access problems which resulted in a third level reprimand in January 2000. However, the plaintiff testified BMW had acted in good faith in believing he had altered the computer system (Moore dep. 166-167). Further, there is no evidence in the record that BMW exhibited any race-based animus towards the pla intiff in its investigation, disciplinary action, and ultimate decision to terminate the plaintiff. Because the plaintiff has failed to produce any evidence that the legitimate reason offered by BMW was pretextual or motivated by discriminatory animus as required by *McDonnell Douglas*, summary judgment should be granted on his discrimination claim.

The plaintiff also alleges he was discriminated against in the denial of his request to transfer to the A shift. To

establish a *prima facie* case, the plaintiff must demonstrate that (1) he belongs to protected class; (2) he was qualified for her job; (3) he suffered an adverse employment action; and (4) he was treated differently from similarly situated employees. Once the *prima facie* case is established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. See *Burdine*, 450 U.S. at 254. If the employer meets its burden of production, the presumption of discrimination raised by the *prima facie* case is rebutted and "drops from the case," and the plaintiff bears the ultimate burden of proving that he has been the victim of discrimination. See *St. Mary's Honor Center*, 509 U.S. at 507.

BMW contends the denial of a transfer to the A shift is not an adverse employment action and furthermore it contends there were no open positions for which the plaintiff was qualified on the A shift. The denial of a transfer to a position with equal pay, benefits, seniority, and responsibility does not qualify as an adverse employment action. See Boone v. Goldin, 178 F.3d 253, 255-256 (4th Cir. 1999) (holding that reassignment can only support a Title VII claim if the reassignment had "significant detrimental effect"). The plaintiff contends a transfer to the A shift would have given him greater opportunities and allowed him to work on more projects (Moore dep. 104). Whether remaining on the B shift would have a significant detrimental effect on the plaintiff is questionable. However, even assuming the plaintiff can establish a prima

facie, there is no evidence in the record that BMW exhibited any race-based animus towards the plaintiff in denying his transfer. Indeed, the plaintiff testified that he was merely speculating that he was denied a transfer to the A shift because of his race (Martin dep. 133-134). Accordingly, summary judgment should be granted on this discrimination claim.

Retaliation Claim

The plaintiff alleges BMW retaliated against him for filing the complaints with the EEOC by with holding pay he was due for unused vacation and earned time.[2] In analyzing retaliation claims under Title VII, where there is no direct evidence of discrimination, the burden-shifting scheme set forth in *McDonnell Douglas* applies. See *Smith v. First Union Nat'l Bank*, 202 F.3d 234,248 (4th Cir. 2000). To establish a prima facie claim for retaliation, the plaintiff must prove (1) he engaged in a protected activity. See *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998). If the plaintiff establishes a prima facie case, the burden shifts to BMW to produce evidence of a legitimate, non-discriminatory reason for the adverse action.

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[2]BMW contends the plaintiff has abandoned his retaliation claim because he admitted in his deposition that he had been paid all monies due him and stated that he did not believe BMW was "stalling" in retaliation. Def. mem. 26. However, in his memorandum in response to the summary judgment motion, the plaintiff stated he still had "an outstanding issue" because BMW did not pay him in a timely manner. Because the plaintiff argues he has not abandoned this issue and out of an abundance of caution, the court declines to find this issue has been abandoned.

See *Burdine*, 450 U.S. at 254. If BMW meets this burden, the plaintiff must show that the proffered reason was pretextual or that the adverse action was motivated by discrimination. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146-48 (2000).

In his deposition, the plaintiff testified that the pay issue was just a "misunderstanding" and that he had received all monies due him[3] (Moore dep.230). In his memorandum, the plaintiff contends BMW did not pay him at the proper time in retaliation for his filing a complaint with the EEOC (Pl. mem.10). BMW contends its policy is to pay terminated employees for their unused vacation days and unused time earned on the regular bi-weekly pay dates following termination. The plaintiff received this compensation on May 5th and May 19th. The plaintiff has not presented any evidence showing BMW's conduct was causally related to the protected activity. Further, assuming the plaintiff could establish a prima facie case, BMW has proffered a legitimate, non-discriminatory reason, that it was standard policy, which the plaintiff has failed to show was pretexual. Accordingly, BMW's motion for summary judgment should be granted on this claim.

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[3] Further, the plaintiff testified that the Wage and Labor Commission had investigated the incident and concluded that the plaintiff had been paid all that was due to him (Moore dep. 230)

CONCLUSION AND RECOMMENDATION

Based on the foregoing, it is recommended that the defendant's motion for summary judgment be granted.[4]

/s/ William M. Catoe

UNITED STATES MAGISTRATE JUDGE

February 15, 2002

Greenville, South Carolina

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[4]If the recommendation contained herein is adopted by the District Court, the pending motion to compel will become moot.